National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

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J. J. Trainor Construction Company, Case 27-CA-10466

530-6067-4000, 530-4850

This Section 8(a)(5) and (1) case was resubmitted for advice in light of the Board's decision in Garman Construction Company, 287 NLRB No. 12 (1987).

On June 30, 1988, the Division of Advice issued a memorandum addressing two issues submitted by the Region: (1) whether the recognition clauses in the parties' collective bargaining agreements establish a Section 9(a) or Section 8(f) relationship between the Employer and the Union; and (2) whether, if the relationship is a Section 8(f) relationship, the Employer, by its actions, manifested an intent to be bound by the terms of the 1986-1989 collective bargaining agreement. The Division of Advice concluded: (1) that the recognition clauses in the prior collective bargaining agreements did not establish a Section 9(a) collective-bargaining relationship between the parties; and (2) that the Employer bound itself to the 1986-1989 collective bargaining agreement by virtue of its conduct. Accordingly, it was concluded that the Employer violated Section 8(a)(5) and (1) of the Act by unilaterally changing the employees' wage rates and repudiating the collective bargaining agreement in March 1988, and that complaint should issue, absent settlement.

The gravaman of the above violation was based on the legal theory that the Employer had adopted the contract by conduct because it had bound itself to the Section 8(f) contract by complying with the extant Section 8(f) agreement, even though it had refused to sign it. In reaching this conclusion, Advice relied on the Board's decision in Vin James Plastering Company, 226 NLRB 125 (1976). In that case the Board held that an employer was bound to an agreement which it did not sign by virtue of the fact that the employer generally complied with the terms and conditions of the agreement. There, the employer paid the wages and the benefits provided for in the contract, checked off union dues and made the required payments to the various funds under the terms of the agreement. However, in Garman Construction Company, above, the Board decided not to follow the Vin James rationale and at slip op. at p. 4, n. 5 refused to affirm the holding of the ALJ [(1)]

...that the Respondent had adopted the Laborers' and Carpenters' master contracts through its actions in following numerous provisions of the master contracts. We do not find this adoption-by-conduct doctrine applicable in 8(f) cases. (emphasis added).

[*FOIA Exemption* 5

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Rather, we conclude that the Employer orally entered into a Section 8(f) contract with the Union when, in 1986 it gave the Union assurances that it would abide by all of the terms of the contract, but would not sign it. First, we conclude that H. G. Heinz Co. [(2)] applies to a Section 8(f) agreement. We recognize that John Deklewa & Sons, Inc. [(3)] involved a written and signed agreement. However, the policy underlying this aspect of Deklewa is that parties should be bound to their agreements. Thus, where there has been a meeting of the minds on all terms and conditions of employment, the policies of the Act would require the parties to be bound thereby. Thus, the Employer in the instant case was bound to the contract when it orally agreed to abide by its terms and conditions of employment and violated the Act when it refused to sign the agreement and later unilaterally changed the employees' wages. [(4)] Garman is distinguishable from the instant case in that there the ALJ found that

the employer was bound to the contract solely on the basis that the employer adopted the contract by conduct because it complied with the terms of the agreement. Here, in contrast to Garman, although the Employer refused to sign the contract, the Employer orally agreed to all of the terms of the contract as well as complied with them.

Accordingly, a Section 8(a)(5) and (1) complaint should issue, absent settlement, alleging that the Employer violated the Act by refusing to sign a contract it orally agreed to and by unilaterally changing the contractual wages of its employees. [(5)]

H.J.D.

[1] The Board did not explain the basis for its holding in Garmon other than the brief statement in this footnote.

[2] 311 U.S. 514 (1941)

[3] 282 NLRB No. 184 (1987)

[4] [*FOIA Exemption* 5

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[5] We adhere to our conclusion in the June 30, 1988 Advice Memorandum that the recognition clauses in the prior collective bargaining agreements did not establish a Section 9(a) collective-bargaining relationship between the parties.